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Hon. BENJAMIN HARRIS BREWSTER,

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OF THE

CONSTITUTIONAL CONVENTION.

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ARGUMENT.

I will first cite the Statutes calling Convention and organising the Convention.

Act Second, June, 1871. P. L., page, 282.

"Enacts that the question of calling a Convention to amend the Constitution of this Commonwealth, be submitted to a vote of the people, &c."

The votes are to be

"For a Convention" or "Against a Convention."

This Act is entitled "An Act to authorize a popular vote upon the question of calling a Convention to amend the Constitution of Pennsylvania."

After the people under the above Act had declared for a Convention. An Act was passed entitled

"An Act to provide for a Convention to amend the Constitution."

11th of April, 1872. P. L., pages, 53, 54, 55, 56, 57.

The sections of that Act provide as follows :

SECTIONS 1st and 2d, prescribe the number of *delegates*—how to be chosen—how apportioned—regulations for election—returns—duties of Prothonotaries and Secretary of the the Commonwealth and Governor.

The 3d Sections prescribes, when and where the delegates shall assemble—how they shall organize, &c.

The 4th Section prescribes, that the Convention shall have power to propose to the citizens of this Commonwealth for their approval or rejection, a new Constitution or amendments to the present one—or specific amendments to be voted for separately. To be signed by President and Chief Clerk—

to be delivered to the Secretary of the Commonwealth—to be recorded and published. It prescribes and provides that one-third of the members may require amendments to be voted on separately, and it prescribes and provides that the Declaration of Rights shall be excepted from the powers given to the Convention.

The 5th Section prescribes that it shall submit the amendments agreed to, to the qualified voters of the State for their adoption or rejection, at such time or times and in such manner as the Convention shall prescribe, subject however to the said limitations, &c.

The 6th Section prescribes that the election for the adoption of the new Constitution or specific amendments, shall be conducted as the general elections of this Commonwealth are now by law conducted, and then prescribes the method of returns, and the mode of proclamation of the result.

The 7th Section fixes the compensation of each member.

The 8th Section—How vacancies to be filled.

The 9th Section defines the duties of the Secretary of the Commonwealth and Sheriffs in reference to the election, and

The 10th Section authorizes the Secretary of the Commonwealth to prepare and furnish statistical information for the Convention.

By virtue of this authority these *delegates* were lawfully elected. It is to be observed that they were elected according to law, and under the law, and that they are styled *delegates*, and that the officers who conducted their elections were governed and regulated in all respects by the general election laws of this Commonwealth. They assembled as *delegates*, when and where the law prescribed they should assemble, and they were organized as the law required they should be organized, and without such obedience to this law in all of these particulars they would not have been *delegates*, and it would not have been the Convention authorized by the law.

Furthermore they were paid according to the law, and have not presumed to lay hands on the public treasury or dispense the State's money, as they purpose to dispense with the

laws of the State. And they have also conformed to the Statute in supplying vacancies, and if they had not so complied, those vacancies would have been unfilled, as they could not order an election, and there was no other way to have a popular choice, except as indicated by the people in the Statute of '72, by which the people gave them the power to substitute.

During its existence it desired legislative authority and relief, and to obtain that, delegates from the Convention attended the legislature, and procured the statute they required in ease of its limitations and restrictions, to be passed by the two houses. The Governor did not sign the statute, but the fact was reported by a delegate, Mr. Buckalew to the Convention, and regret was expressed that the statute had not been passed, thereby conceding and confessing that it was subordinate to the law making power of the State, which still existed under a Constitution, not one line or letter of which has yet been abrogated or rescinded, and by virtue of which this court now sits here exercising its judicial functions controlling and commanding every tribunal and every citizen within the Commonwealth.

This Convention composed of these delegates, with but limited powers, and with prescribed restrictions, was chosen by the people under the Act of 11th of April, 1872, and by an express declaration of popular will they were delegated with this their charter or letter of attorney, binding them, and beyond which they could not go. From the first they were subordinate to the law as we all are, and never for one minute have they been absolute as they might have claimed to be had the statute creating them expressly so indicated and prescribed. And even that might be disputed and denied for such a statute conferring absolute power would have been a direct violation of the Constitution of the United States, which secures to every State a Republican form of government, and a State once subject to any absolute authority can in no sense be said to be a Republican form of government. Such a body with absolute power would be an oligarchy or an aristocracy, but it would not be a Republican form

of government. For if the power—absolute power which is claimed for this Convention, vests in it to legislate and ordain laws for our immediate and present government—to create and appoint officers unknown to the law—exists, then the Constitution is dead—the legislature is dead—the Governor is dead—and the judiciary are dead. It may prolong its existence indefinitely and it may appoint an executive —a judiciary—or it may confer its authority upon Commissioners, Consuls or Directories to exercise executive and legislative or judicial functions instead of proposing to the citizens of this Commonwealth for their approval or rejection, a new Constitution or amendments to the present one.

This the people did not understand to be the nature of the grant they made when they elected their delegates under the Act. of 11th of April, 1872, and as the people understood so must they take. The delegates accepted their powers under, and by that statute, so their acts prove, and as they accepted from the beginning, so must they continue to the end, limited and restricted, not absolute and despotic.

The Convention transacted its business, and prepared a constitution, but they did more, they did that which was *ultra vires*, and it is because it exceeded its authority, we are here now to complain, and to ask that its illegal subordinates substitutes and instruments shall be restrained by one of the co-ordinate branches of the legally constituted authorities of a state, that still exists, under a constitution that is not yet dead.

The Convention passed what it called an ordinance for submitting the amended constitution to the vote of the qualified electors.

It is this ordinance which we resist, as it proposes to repeal the provisions of the Act of 11th, April, 1872, by virtue of which it alone exists.

The delegates as a Convention cannot accept part of this act, and reject part of it.

They have no imperial power of dispensation or repeal.

We know of no such power of dispensation in this country.

The crown of England has no such power, the exercise of it within two hundred years, cost one king his head, and another king his crown.

There is no power of repeal except by the legislature, that still lives and breaths under the present constitution, and that legislature and its acts must be obeyed, till it is expressly superceded, and its charter under which it acts is also superceded by higher expression of popular will.

This must be so, or they must affirm that they are dehors the law—that they exercise this power from necessity, like a provisional government, necessity not because of default of the regular authorities, for they live, and your presence testifies to that. They must assert and maintain that they have indeterminate governmental powers, and that finally, they are not subaltern or anciliary to any other institution whatever, but Lords paramount to the entire political domain, and if this be so, they may as I have before said, prolong their existence, give us another Barebones parliament, or Perpetual Assembly; or like the past and present French enormity, impose upon a free people, its sham Presidents, Regents or Dictators. It is here to be observed that this ordinance, of which we complain, and which assumes to have all the attributes of a law, possesses not one of the ordinary sanctions that give vitality to a law.

1st.–It is repugnant to an existing law, enacted by constituted authority.

2nd.–It is not enacted by a law making power.

3rd.–It is declared a law without any of the necessary unities of legislation. Unities established for the peace of society and to guard the people against rash, unwise and despotic laws.

4th.–As a law it is vicious in itself, and cannot be enforced.

It has not been acted upon by two houses, it has not had the sanction of a Governor or Executive.

The Government under which we live, secures to all of us these pre-requisites. Something besides the despotic tyranny of a popular or conventional majority. The charm of

our system is, that we have numberless checks and balances. The method of selecting both houses, and the difference in the terms of service. The apportionment of districts. The restraints of the constitution, and above all, the courts of justice, are all of them safeguards against the absolutism of violent majorities, obtained by faction or prejudice, or from any other improper course, and who act under the "occasional will" of the house. "Whenever arbitrary discretion leads or legality follows," as Burke has it. In all this consists the beauty of American liberty, which guards the citizen and his individual rights, against every usurping power; which protects his person and his property from the very State, making him in that which belongs to himself of right, superior to all the rest; a monarch, in the enjoyment of his own; a freeman, as against the control and bondage of society; thus it is at once, that order and liberty, freedom and obedience—private right and public duty—are happily obtained by our system, so simple in its action, so complex in its structure, so seldom understood, so generally felt and enjoyed, partly traditional, and partly the result of human experience, human wisdom, long usage, and as I believe, providential interposition. Freedom is not only the right of the citizen, but it is a sacred trust, which it is the duty of all to preserve intact. This freedom we believe and assert by this ordinance, these delegates have violated. They were sent to propose changes, not to enact laws and enforce them. Not to legislate and execute their legislation. Their function was suggestive, advisory, and when they have performed that function they are dead.

To give life to any of their acts, the people must intervene. If they can legislate and execute that legislation, then we are living in a state of practical anarchy, for as Mr. Webster said in the Dorr case, "there would then be two legislatures in existence at the same time. Both could not be legitimate."

The ordinance is vicious in itself, and cannot be enforced, inasmuch as it undertakes first, to control officers of the law, who owe no allegiance to these delegates. The election

officers, the Secretary of the Commonwealth, the Sheriffs are commanded to obey it, they owe no allegiance to these delegates. It undertakes to create offices unknown to the law, and to appoint those officers when it possesses no appointing power.

Delegatus non potest delegari. Not only is this true, in regard to them in their office as delegates, by absolute and necessary implication of law, but it is doubly true in as much as the 5th section creating them expressly prescribes that they shall submit their amendments in such manner as the *Convention* shall prescribe, and not in such manner as the *Commissioners' instruments* or substitutes appointed by the Convention shall prescribe.

The delegates could as easily create an executive as appoint these commissioners. The creation of this office that relates to public suffrage, in the adoption of the fundamental law of the land, is an act of arbitrary regal imperial despotic power. It is as if we were not a people or Commonwealth, governed by a republican form of goverment, seeking by lawful means to modify and improve our charter, for our own convenience, and of our own will, but it is as if we were a subjugated people, under the rule of a tyrant, as king John was, and as if these delegates were the parliament of Runnymede dictating these terms, and appointing its commissioners as did that parliament appoint its committee of 24, to watch that king and exact his obedience to their laws.

The power of creating offices, new and unusual offices, has ever been considered to be one of the most flagrant abuses of despotic or usurping governments. In England, parliament alone can do this, the king dare not. In Russia and in Turkey the Czar and the Sultan may.

The 4th section of this ordinance creates 5 commissioners of election, and then appoints the commissioners, and as if this were not enough to indicate the largest grasps of absolute power they provide that these officers shall have power to fill vacancies in their own numbers!! These substitutes of mere delegates shall have power to re-create

themselves! To submit to this would be a depth of servility to which we have not yet come. It would be the degradation of a free Commonwealth to be governed at such a time and for such a purpose by a deputy's-deputy. Further these officers are to be sworn or affirmed. How sworn—according to what law? But they are not "Governed" and regulated in all respects by the general election laws of the Commonwealth as the act of 27 April 72 provides:

How then are the people to be protected from abuse of power and corruption? Where are the pains and penalties and punishments that should follow perjury or any mal-feasance or wilful mis-feasance of office that can and may be perpetrated by these commissioners, their substitutes, or their subordinates under this ordinance.

The 4th Section says, that it shall be the duty of said Commissioners or a majority of them to make a registration of voters. What does this mean? this requires explanation and interpretation—What do they mean by registration? In an ordinance like this and for such a purpose where rights of the most sacred character are ruled, the language should be explicit and plain and not require interpretation, and if to be interpreted to be subject to Judicial interpretation, and not to the absolute power of these Commissioners or a majority of them. For if these delegates be absolute then there are no Judges in this Commonwealth to command their deputies, they are dehors the law and do not know you.

Further, they are to appoint the Judge and two inspectors for each election division and to appoint also overseers of election, overseers of their own subordinates. But in addition to that they are to give all *necessary instructions* to the election officers regarding their duties in holding the election and making their returns thereof.

How harshly this sounds to the ears of every free man. These deputies of deputies are to give necessary instructions to the election officers. What is meant by necessary instructions? Can this be called a law? No, it is an Ordinance. It is a declaration of despotic will, it is not a rule prescribed by which these men shall be governed and we be governed un-

derstandingly. 'Tis not a rule permanent and uniform. For under this term "necessary instructions," they may issue transient and sudden orders. It is not a rule because it may be advice or counsel which these officers may follow or not. For be it observed the word is "instructions." Blackstone says obedience to law depends not upon our approbation but upon the makers will, Counsel or instruction is only a matter of persuasion. Law is a matter of injunction, Counsel or instruction acts only upon the willing, law upon the unwilling also. Neither is it prescribed but it is confined to their breasts and not manifested by any external sign, therefore it can be no law. It is requisite that it should be notified to those who are to obey it. And those who are to obey it and be effected by it in their dearest rights—are the people not these election officers only.

The Constitution as it exists and the legislature as it has enacted has provided a prescribed way and commanded that prescribed way to these delegates, so that all might know how they were to be governed in deciding upon these proposed amendments.

Mr. Webster in his great argument in the case of Luther vs. Borden and others in 7th Howard, S. C. U. S. Reports in pages 29-30-31-32 and 33 deals with this very subject and as he was the monarch of this branch of juresprudence I will here read to the court that which he says, and I will further call the attention of the court to a passage in Chief Justice Taney's opinion on page 40, of that same case. By these citations the court will see that we are not wholly without some authority of jurisconsult and of Judge,to justify and maintain all that I have here asserted upon the reason of the thing.

If we will be told that there is no precedent for what I here assert, I will point to that argument and that decision as sufficient to stand upon, forgetting and putting out of mind altogether the masterly and triumphant dissertation of Mr. Jameson who trampels in the dust these haughty pretentions of these arrogant delegates. Some there are, who have now and then in the history of this question ventured to assert this Draco doctrine of absolute power in these Conventions of

delegates. The old Convention of 1838, repudiated this doctrine, although it was sought to impress it upon it. The celebrated Dallas letter met with universal reprobation and produced a reaction that hurt the very cause it was intended to help. To understand it, we must remember the occasion that produced that letter, it was written to reach the charter of the State Bank of the United States. It was the appetite of the partisan and politician and not the intellect of the statesman and the Jurist that instigated that letter.

In other Conventions, especially the Southern ones, where this doctrine of absolutism has been asserted (which savours of Hobbes, Leviathan and Sir Robert Filmer and Rousseau's wild social compact, rather than of Milton and Coke and Sidney and Locke,) there was an appetite for legislation that should perpetuate slavery, that infamy of our race—of our age and even of our own nation, and it was that passion that in them inflamed not the best, but the worst of men to assert this dogma of despotism.

We ask this court to bid the law to be supreme and not this mishappen ordinance of these despotic and aggressive delegates. The law has been the only compensation for political tyranny in the darkest days that the world has ever known. Bid that to be supreme and you will as Aristotle that master of human thought declared ages ago, and whose words come down to us almost like inspired revelation "you will make God supreme; but he who intrusts man with supreme power gives it to a wild beast, for such his appetites sometimes make him —passion too influences those who are in power, even the very best of men, for which reason the law is intellect, free from appetite."

And I will conclude that which I have here argued by reminding this court as Mr. Jameson reminds us all in his motto to his masterly work. "That they who go about by disobedience to do no more than reform the Commonwealth shall find that they do thereby destroy it."